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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re

ROBERT ROSENKRANTZ

on Habeas Corpus.

B208900

(Los Angeles County
Super. Ct. No. BH004885)

APPEAL from an order of the Superior Court of Los Angeles County, Steven R. Van Sicklen, Judge. Reversed.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Amanda Lloyd, Deputy Attorney General, for Appellant.

Marc Elliot Grossman and Michael Satris for Respondent.

Matthew Cate, Secretary of the California Department of Corrections and Rehabilitation (the Department), appeals from the grant of a petition for a writ of habeas corpus in favor of Robert Rosenkrantz, ordering that Rosenkrantz be discharged immediately from parole. We reverse.

BACKGROUND

In 1986, Rosenkrantz was convicted of second degree murder with use of a firearm and sentenced to state prison for 17 years to life. In a petition for a writ of habeas corpus filed in superior court on October 3, 2007, Rosenkrantz alleged that although he should have been released from prison in July 1997, after protracted litigation he was not released until August 5, 2006. A “Notice and Conditions of Parole” form prepared by the Department and signed by Rosenkrantz upon his release specified that parole was “for a period of 5 years.” Rosenkrantz further alleged that the period between July 1997 and August 2006 constituted “surplus” or “excess” time in custody for which he was entitled to credit against his five-year parole period, thereby warranting his immediate discharge from parole. In support of his allegations, Rosenkrantz relied primarily on *McQuillion v. Duncan* (9th Cir. 2003) 342 F.3d 1012, 1015, and *Martin v. Marshall* (N.D.Cal. 2006) 448 F.Supp.2d 1143, 1145.

An order to show cause was issued. In a return to the petition, the Department argued that Rosenkrantz had been in lawful custody until his August 5, 2006 release, that his five-year parole period did not begin until that time, and that he was not entitled to any credit for time in custody prior to his release date on parole.

In a traverse to the petition, Rosenkrantz cited a nonpublished Court of Appeal opinion (*In re Smith* (Sept. 5, 2007, H030201) in support of his position.

On March 18, 2008, the trial court granted Rosenkrantz’s petition and ordered that he be discharged from parole. In its order, the court stated that the “only real issue here is whether the parole period of a life prisoner convicted of murder may be reduced by application to the parole period of credit for actual custody time in excess of the term set by the [Parole] Board.”

On March 27, 2008, the Department filed a request to reconsider the order granting Rosenkrantz's petition and to stay the order of immediate discharge from parole. The request was based on *In re Bush* (2008) 161 Cal.App.4th 133 (*Bush*), which had been filed on March 25, 2008. The Department argued that under *Bush*, an inmate who had served excess time in custody was not entitled to have that time credited against his parole period.

In opposition to the Department's request, Rosenkrantz argued that *Bush* was distinguishable on its facts and that his situation was analogous to the federal cases cited in his petition.

On April 16, 2008, the court denied the Department's request. In its order of denial, the court stated that "[t]he improper detention in this case was much more egregious than in the *Bush* case" and that the court "chose to follow" the nonpublished decision in *In re Smith, supra*, H030201.

On May 8, 2008, the Department filed two pleadings in the trial court. One was an "amended return to order to show cause." In it, the Department acknowledged that the notice of parole provided to Rosenkrantz upon his release from prison stated that his parole period was five years. But the Department alleged that the notice was in error because it conflicted with Penal Code section 3000.1, which requires lifetime parole for persons convicted of second degree murder, with discharge after five years subject to the parole board's retaining the person on parole for good cause.¹ The Department argued that the statute, rather than the erroneous parole notice, should control. The Department

¹ Under Penal Code section 3000.1, subdivision (a), the parole term for murder with a maximum term of life in prison is "the remainder of the inmate's life." Section 3000.1, subdivision (b) provides: "Notwithstanding any other provision of law, when any person referred to in subdivision (a) has been released on parole from the state prison, and has been on parole continuously for . . . five years in the case of any person imprisoned for second degree murder, since release from confinement, the board shall, within 30 days, discharge that person from parole, unless the board, for good cause, determines that the person will be retained on parole."

further noted that documents in Rosenkrantz's prison file other than the August 5, 2006 notice of parole form refer to a lifetime period of parole.²

The second pleading filed by the Department on May 8 was an "emergency application for relief from [the trial] court's March 18, 2008 order due to material mistake of fact, or alternatively, for reconsideration, modification, or revocation of [the] March 18, 2008 order." The application stated that the Department had "recently audited" Rosenkrantz's file and learned that the five-year period specified in the notice of parole form was in error, but that in responding to the petition the Department "mistakenly went along with [Rosenkrantz's] allegation based on this document." The Department argued that Rosenkrantz "should not receive a windfall due to an administrative error on his latest release form or to a related mistake in pleading."

On May 16, 2008, the Department's emergency application for relief was denied. In the order of denial, the court stated: "It would appear from the record that the inmate is entitled to remain discharged from parole under the authority of section 3000.1 (b) Penal Code. The time this inmate has been on actual parole plus the time credited to parole because of time in custody in excess of the term set by the Board is enough to justify his current status and remain discharged from parole."

Also on May 16, the Department filed a notice of appeal from the March 18, 2008 order granting the petition for a writ of habeas corpus.³

DISCUSSION

The Department contends that "Rosenkrantz is subject to lifetime parole under Penal Code section 3000.1 and is not eligible for discharge from parole until August 5,

² For example, a "Notice and Conditions of Parole" form signed by Rosenkrantz on August 4, 2006, has blanks that appear to have been filled in with a typewriter. It states that Rosenkrantz's parole is "for a period of LIFE." (In contrast, the August 5 notice at issue in this appeal has blanks that have been filled in by hand.)

³ The appeal is authorized under Penal Code section 1506.

2011.” In support of its contention, the Department relies on *In re Moser* (1993) 6 Cal.4th 342, in which the Supreme Court stated that “the length of a parole term is *not* a permissible subject of plea negotiations. The lifetime term of parole . . . is a statutorily mandated element of punishment imposed upon every defendant convicted of second degree murder. [Citation.] Neither the prosecution nor the sentencing court has the authority to alter the applicable term of parole established by the Legislature.” (*Id.*, at p. 357.)

Rosenkrantz counters that the contention is procedurally barred because the Department failed to raise it in its return to the habeas corpus petition. In addition, continues Rosenkrantz, the doctrine of invited error should be applied because in the Department’s return and its request for reconsideration based on the then newly decided *Bush* opinion, the Department accepted as valid the notice of a five-year parole period on which Rosenkrantz relied.

Given the requirement of Penal Code section 3000.1, subdivision (b), and the parole notice of August 4 specifying a lifetime period of parole, the five-year period of parole in the August 5 notice at issue in this case is no doubt the result of a scrivener’s error made while filling in the blank on the notice of parole form. More disturbing than the error itself is the Department’s failure to address the error in responding to litigation in which the notice of parole form played a central role. But in assessing the arguments presented on appeal, our task is not to evaluate the performance of the Department’s staff or counsel. Rather, our independent review is focused on the record itself. (See *In re Rosenkrantz* (2002) 29 Cal.4th 616, 677.) That record contains a notice of parole form which is clearly in error, and Rosenkrantz has failed to provide authority that would compel us to ignore the error.

As a result of the trial court’s understandable belief that Rosenkrantz was subject to a maximum parole period of five years, it granted Rosenkrantz immediate discharge from parole, thereby disregarding the parole board’s statutory authority under Penal Code section 3000.1, subdivision (b) to determine whether good cause existed to retain Rosenkrantz on parole. As such, the grant of habeas corpus relief cannot stand.

We further note that in its appeal the Department has not challenged the trial court's findings regarding the "excess" or "surplus" time that Rosenkrantz was held in actual custody. We express no opinion as to those findings.

DISPOSITION

The order under review is reversed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

I concur:

BAUER, J.*

* Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

ROTHSCHILD, J., Dissenting.

I respectfully dissent. Appellant raises a single issue on appeal and concedes that, because the issue was not timely raised in the superior court, we have discretion to decline to consider it. The majority is surely correct that Rosenkrantz cites no authority “that would compel us to ignore” the error of which appellant now complains. (Maj. opn., p. 5.) But it is likewise true that appellant cites no authority that would compel us to exercise our discretion in favor of considering the issue, which appellant did not timely raise in the proceedings below. Because the interests of justice favor Rosenkrantz, I would decline to exercise our discretion. The trial court apparently determined, and appellant does not deny, that Rosenkrantz served 9 years in prison in excess of the term set by the Parole Board. Moreover, appellant has not shown that failure to grant relief from appellant’s error poses a danger to society, or that the error was due to excusable neglect. I would therefore affirm the order under review.

ROTHSCHILD, J.